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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>L.C. LEWIS BUTLER,<br><br>Defendant and Appellant. | B286404<br><br>(Los Angeles County<br>Super. Ct. No. GA090523) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Teri Schwartz, Judge. Remanded and Affirmed.

C. Matthew Missakian, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Mary Sanchez, Deputy Attorneys General, for Plaintiff and Respondent.

This is an appeal from a trial on alleged prior convictions, ordered on remand in the first appeal in this case.

Defendant L.C. Lewis Butler was charged by information in count 1 with first degree burglary (Pen. Code, § 459)[1] and in count 2 with evading an officer (Veh. Code, § 2800.2, subd. (a)). In each count it also was alleged that defendant had suffered two prior strike convictions under the "Three Strikes" law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)), two prior serious felony convictions (§ 667, subd. (a)(1)), and that he had served four prison terms (§ 667.5, subd. (b)).

After defendant pled no contest to count 2, a jury trial was held on count 1, with trial on defendant's alleged priors being bifurcated. The jury convicted defendant on count 1. The bifurcated trial on the priors was continued several times, but never held. Nonetheless, the court and parties proceeded as if the priors allegations had been found true.

The court denied defendant's motion to strike his strike convictions (see *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497), and sentenced him to a term of 35 years to life in state prison: 25 years to life (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) on count 1 plus 10 years for the two five year priors (§ 667, subd. (a)(1)). Appellant's sentence on count 2 was stayed pursuant to section 654.

In defendant's first appeal from the judgment (case No. B262334), we remanded the case for further proceedings on the prior convictions and resentencing.

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1 Unspecified section codes refer to the Penal Code.

Following remand, an amended information was filed alleging two prior convictions as strikes (§§ 667, subd. (d), 1170.12, subd. (b)) and serious felonies (§ 667, subd. (a)). The two alleged prior convictions were: (1) a conviction of attempted first degree burglary in case No. YA052593, and (2) a conviction of first degree burglary in case No. VA098275. Four prior prison terms (§ 667.5, subd. (b)) were also alleged.

The trial court held a non-jury trial on the priors, found them true, denied defendant's motion to strike his prior strikes, and (as previously) sentenced him to a term of 35 years-to-life (striking the section 667.5, subdivision (b) priors).

In this appeal from the judgment on remand, defendant contends: (1) he had a constitutional right to a jury trial on his prior convictions; (2) because the documentary evidence in support of one of his priors (case No. YA052593) was not conclusive as to the nature of the conviction, the trial court violated his right to a jury trial by resolving the discrepancies in the records; (3) the trial court erred in taking judicial notice of his testimony at his first trial; (4) the trial court violated his statutory right to a jury trial; (5) the trial court misunderstood its discretion to strike defendant's prior strike convictions; (6) in light of Senate Bill No. 1393 (SB 1393 (2017-2018 Reg. Sess.), defendant is entitled to a remand for the court to exercise its discretion whether to strike defendant's section 667, subdivision (a) priors; and (7) defendant is entitled to credit for 1,555 days spent in presentence custody, plus 86 days of conduct credit (which includes

credit from the time of arrest to the date of his original sentencing).[2] We find no reversible error in the trial court's true findings on the prior convictions, but vacate the sentence and remand for the trial court to exercise its discretion whether to strike the section 667, subdivision (a) priors. In addition, on resentencing, the trial court must recalculate (and credit the defendant with) all actual days spent in jail or prison through the date of that resentencing. To aid in that calculation, we note that as of May 24, 2017, the date of the first resentencing at issue in this appeal, defendant was entitled to 1,555 days of actual presentence custody. Also, the court must award local conduct credit of 86 days (calculated at 15%) for the period of defendant's county jail custody from the date of arrest (July 31, 2013) to his original sentencing (February 24, 2015). The court shall prepare an amended abstract of judgment reflecting these calculations, in addition to any other change in sentence made upon remand. In all other respects, the judgment is affirmed.

## BACKGROUND

At the court trial on the prior conviction allegations, paralegal Julie Wong of the Los Angeles County District Attorney's Office,

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[2] In his opening brief, defendant contended he was owed an additional 86 days of custody credit. In its brief, respondent noted that that the abstract of judgment already reflected 66 days of credit, and that defendant was entitled to 20 additional days. In his reply brief, defendant notes that there is no disagreement: he is entitled to a total of 86 days custody credit, not 86 in addition to the 66 days already shown in the abstract of judgment.

presented certified section 969b "prison packets"[3] regarding the prior convictions allegedly constituting strikes (§§ 667, subd. (d), 1170.12, subd. (b)) and serious felonies (§ 667, subd. (a)), as well as four prior prison terms. Because defendant's primary challenges on appeal deal with the prior conviction in case No. YA052593 ("YA052593"), we focus on the evidence related to that prior. As necessary, we discuss additional evidence in responding to defendant's other contentions in our Discussion section, below.

I. *969b Packet*

Attempted first degree burglary is both a strike under the Three Strikes law (§§ 667,subd. (d), 1170.12, subd. (b)) and a prior serious felony (§ 667, subd. (a)). (See § 1192.7, subds. (c)(18) [defining "serious felony" to include "any burglary of the first degree"]; *id.,* subd. (c)(39) [defining "serious felony" to include "any attempt to commit a crime listed in this subdivision other than an assault"]; §§ 667, subds. (b) & (d)(1), 1170.12, subds. (a), (b)(1) [defining strike as, inter alia, "any offense defined in subdivision (c) of Section 1192.7 as a serious felony"].) Attempted second degree burglary is neither a strike nor a serious felony. As relevant to prove that defendant's prior conviction in

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[3] Section 969b provides, in relevant part: "For the purpose of establishing prima facie evidence of the fact that a person being tried for a crime or public offense under the laws of this State has been convicted of an act punishable by imprisonment in a state prison, . . . the records or copies of records of any state penitentiary . . . in which such person has been imprisoned, when such records or copies thereof have been certified by the official custodian of such records, may be introduced as such evidence."

YA052593 was for attempted first degree burglary, the 969b packet contained the following.

A. *Abstract of Judgment*

First, the packet contained a certified abstract of judgment in case YA052593 dated February 26, 2004, which showed the following: (1) on April 9, 2003, defendant was convicted in count 1 of violating sections "664/459"; (2) the crime was "Attmpt Res burglary 1st"[4]; and (3) on February 25, 2004, after revocation of probation, defendant was sentenced to the upper term of three years in prison, consistent with the punishment scheme for attempted first degree residential burglary. Such a sentence is not authorized for attempted second degree burglary.[5]

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[4] Because "[e]very burglary of an inhabited dwelling house" is first degree burglary (§ 460), the crime is sometimes referred to as "residential" burglary, hence the abbreviation "Attmpt Res burglary 1st".

[5] Under section 664, subdivision (a), as here relevant, the sentence for an attempt is one-half the term prescribed for the offense. First degree burglary is punishable by imprisonment for two, four, or six years. (§ 461, subd. (a).) Thus, the three-year upper term which defendant received was necessarily for attempted first degree burglary (one-half of the upper term of six years). This sentence could not have been for attempted second degree burglary. The possible prison terms for second degree burglary are 16 months, two or three years (§§ 461, 1170, subd. (h)), making a three-year sentence for attempted second degree burglary impossible: the maximum would have been 18 months (one half the three-year upper term).

B. *Minute Orders*

Second, the packet contained copies of certified computer minute orders from YA052593. The minute orders were consistent in all material respects with the abstract of judgment, including the nature of the conviction and sentence. One such minute order showed that on April 9, 2003, the charge in count 1 was amended to read "violation of 664-459 PC instead of 459 PC." Defendant then pled nolo contendere "to a violation of section 664-459 PC" in count 1. The court found "the offense in count 01 to be in the first degree," and sentenced defendant to "the upper term of 3 years." The court then suspended execution of sentence, placed defendant on formal probation for three years, and ordered him to serve 365 days in county jail (with credit for 375 days in custody).

Another such minute order dated February 25, 2004, stated that the court found defendant in violation of probation, revoked probation, and placed in effect the three-year sentence that had been suspended on April 9, 2003.

C. *CLETS Rap Sheet*

Third, the 969b packet contained a certified copy of a CLETS rap sheet dated December 9, 2016, which likewise was consistent with the abstract of judgment in all relevant respects. Among the entries describing defendant's criminal history was an entry listing defendant's CDC No., "#P94529" and referring to "CNT:01 . . . Violation of Parole." Although the entry erroneously referred to a "parole" rather than a probation violation, it also stated: "CNT: 02—Attempted 459 PC

Burglary: First Degree Sen From: Los Angeles Co." It referred to the case No. "CRT # YA05259301" (YA052593, but adding 01 at the end), and stated: "Sen: 3 years prison."

D. *CCHRS Rap Sheet*

Finally, the packet contained a certified copy of a rap sheet dated December 9, 2016, from the Los Angeles County Consolidated Criminal History Reporting System (CCHRS). In the entry relating to conviction, it was consistent with the foregoing evidence in all relevant respects but one. The entry stated: "PC 664/459 . . . *Attempt Commercial Burg* [rather than first degree burglary] 04/09/2003 Convicted." (Italics added.) However, consistent with the abstract and other records, it stated that defendant received formal probation for "3 year(s) and 365 day(s)." It also stated: "02/25/2004 Convicted Prob. Revoked, 3 year(s) state prison."

II. *Defendant's Testimony*

At the prosecution's request, the trial court took judicial notice of the proceedings from the underlying jury trial, specifically defendant's testimony that, in substance, he had been to prison four times, had been twice convicted of "breaking into somebody's house," and been convicted of attempted burglary.

## DISCUSSION

I. *Constitutional Right to a Jury Trial*

Defendant contends that he had a categorical constitutional right to a jury on the fact of a prior conviction. He acknowledges that we are bound by the California Supreme Court's contrary holding in *People v. Gallardo* (2017) 4 Cal.5th 120 (*Gallardo*).

In *Gallardo,* the California Supreme Court established the limits of judicial fact-finding in determining allegations of prior convictions. The court noted that "[u]nder the Sixth Amendment to the United States Constitution, as interpreted in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (*Apprendi*), any fact, other than the fact of a prior conviction, that increases the statutorily authorized penalty for a crime must be found by a jury beyond a reasonable doubt." (*Gallardo, supra*, 4 Cal.5th at p. 123.) Reviewing the United States Supreme Court decisions in *Descamps v. United States* (2013) 570 U.S. 254 and *Mathis v. United States* (2016) 579 U.S. ___ [195 L.Ed.2d 604], the court overruled its own prior decision in *People v. McGee* (2006) 38 Cal.4th 682, which had permitted the trial court to consider the record of the prior conviction "to determine whether 'the conviction realistically may have been based on conduct that would not constitute a serious felony under California law.' [Citation.]" (*Gallardo, supra,* 4 Cal.4th at p. 124.) In place of the *McGee* rule*,* the court fashioned the following standard: "when the criminal law imposes added punishment based on findings about the facts underlying a defendant's prior conviction, '[t]he Sixth Amendment contemplates that a jury—not a sentencing court—

will find such facts, unanimously and beyond a reasonable doubt.' (*Descamps, supra*, 570 U.S. at p. ___ [133 S.Ct. at p. 2288].) While a sentencing court is permitted to identify those facts that were already necessarily found by a prior jury in rendering a guilty verdict or admitted by the defendant in entering a guilty plea, the court may not rely on its own independent review of record evidence to determine what conduct 'realistically' led to the defendant's conviction." (*Gallardo*, *supra,* 4 Cal.5th at p. 124.)

The court in *Gallardo* remanded the case "to permit the trial court to make the relevant determinations about what facts defendant admitted in entering her plea. Our precedent instructs that determinations about the nature of prior convictions are to be made by the court, rather than a jury, based on the record of conviction. [Citation.] We have explained that the purpose of the latter limitation is to avoid forcing the parties to relitigate long-ago events, threatening defendants with 'harm akin to double jeopardy and denial of speedy trial.' [Citation.] The Attorney General has not asked us to reconsider this aspect of our precedent. His primary contention, rather, is that the trial court on remand should review the record of conviction in order to determine what facts were necessarily found or admitted in the prior proceeding. Such a procedure fully reconciles existing precedent with the requirements of the Sixth Amendment." (*Gallardo*, *supra,* 4 Cal.5th at p. 138.)

As defendant concedes, *Gallardo* is controlling: a defendant has no categorical right to a jury trial on the fact of a prior conviction.

II. *Inconclusive Records*

Assuming he had no categorical right to a jury trial on the fact of his prior conviction, defendant contends that the trial court exceeded the permissible bounds of judicial fact-finding. According to defendant, the records reviewed by the trial court were not conclusive in showing that in YA052593 he was convicted of attempted first degree burglary. Rather, defendant suggests that he might have been convicted of attempted commercial burglary. Characterizing the records submitted here, defendant asserts that "[t]he priors exception to the constitutional right to a jury cannot apply when judicial records are so contradictory, incomplete, or 'downright wrong' that they require the trier of fact to weigh the 'credibility' of contradictory documents, to guess about relative reliability of the individuals and processes that created the records, and to decide what degree of doubt is raised by certain red flags of unreliability."

Even were defendant's characterization of the records correct (it is not), we would reject the contention. Discrepancies in records documenting the nature of a prior conviction are likely to exist given the various sources of records commonly used to prove prior convictions, but the trial court is authorized to resolve those discrepancies. As *Gallardo* instructs, "precedent instructs that determinations about the nature of prior convictions are to be made by the court, rather than a jury, based on the record of conviction." (*Gallardo, supra*, 4 Cal.5th at p. 138.) Here, as authorized by *Gallardo*, the court identified the crime of which defendant was convicted from the abstract of judgment and other records, and in that way "identif[ied] those facts that were already

necessarily . . . admitted by the defendant in entering a guilty plea"; the court did not "rely on its own independent review of record evidence to determine what conduct 'realistically' led to the defendant's conviction." (*Id.* at p. 124.)

In any event, even were there a rule such as defendant posits—he would require a jury trial unless the records of the prior conviction are "conclusive"—this is not a case in which such a rule would apply. In our BACKGROUND section, above, we have summarized the relevant records of defendant's conviction in YA052593, and need not do so again here. Suffice it to say that the record is "conclusive," in that there are no rational questions of "credibility" regarding the documentary evidence of defendant's conviction. Simply put, as reflected in the certified copy of the abstract of judgment, and consistent with the only rational reading of every other record as a whole (save one notation in the CCHRS rap sheet), there is no doubt that defendant was convicted of attempted first degree burglary on a no contest plea and sentenced to the upper term of three years in prison, a punishment authorized for attempted first degree burglary but not for second degree commercial burglary. The only discrepancy of any marginal note identified by defendant (he purports to identify several others, but he relies on a fanciful rationale as to how these discrepancies are material) is a single reference in the CCHRS rap sheet , which states, "PC 664/459 . . . Attempt Commercial Burg [rather than first degree burglary] 04/09/2003 Convicted." But it also reflects a prison term applicable only to first degree burglary, and not second degree commercial burglary: "02/25/2004 Convicted Prob. Revoked, 3 year(s) state prison." Indeed,

all the records introduced show that defendant was sentenced to three years in prison. Defendant does not dispute that he was so sentenced, yet fails to explain how (given that undisputed fact) he could have been convicted of attempted second degree burglary rather then attempted first degree burglary. The only apparent basis is that he assumes he could have been illegally sentenced, or that every entry showing his sentence could be incorrect. But that notion is no rational basis on which to find the trial court engaged in fact-finding in violation of his right to a jury trial. In short, the records of the conviction are, indeed, "conclusive." They leave no possibility that defendant was convicted of second degree burglary.

III. *Defendant's Testimony*

Defendant contends that the trial court erred in taking judicial notice of his testimony from the guilt trial, in which he admitted (in substance) that he had been convicted twice for breaking into someone's house. According to defendant, this violated his right to a jury trial, because it constituted evidence outside the record of conviction from which the court could infer the conduct underlying his conviction in YA052593.

However, defendant failed to object to the evidence, and therefore the claim is forfeited. (*People v. Woodell* (1998) 17 Cal.4th 448, 458.) Defendant contends that an objection would have been futile at the time of the trial (May 3, and May 24, 2017), because it was not until December 2017 that the Supreme Court in *Gallardo* overruled *McGee*. We disagree. In October 2015, this court decided *People v. Marin* (2015)

240 Cal.App.4th 1344 (*Marin*). Building on prior decisions that limited *McGee* (*People v. Wilson* (2013) 219 Cal.App.4th 500, and *People v. Saez* (2015) 237 Cal.App.4th 1177) and relying on *Descamps, supra,* we held in *Marin* that the procedure permitted by *McGee* (judicial factfinding as to what conduct "realistically" underlay the conviction) violated a defendant's right to a jury trial. We held, in part: "under *Descamps*, judicial factfinding authorized by [*McGee*], going beyond the elements of the crime to 'ascertain whether that record reveals whether the conviction realistically may have been based on conduct that would not constitute a serious felony under California law' [citation], violates the Sixth Amendment right to a jury trial." (*Marin, supra*, 240 Cal.App.4th at p. 1348.) Other similar decisions by the Courts of Appeal followed in 2016. (See *Gallardo, supra,* 4 Cal.5th at p. 143, and cases therein cited (Chin, conc. and dis.).) Given this case authority from as early as 2015 clearly holding that *McGee* was no longer controlling, it would not have been futile at defendant's 2017 trial on his priors to object that it was improper for the court to consider defendant's testimony to prove the conduct underlying his prior conviction. Thus, defendant's failure to object to the court considering his testimony from the guilt trial forfeits the issue on appeal.[6]

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[6] Defendant also asserts that an objection was not required because a violation of the constitutional right to a jury trial cannot be waived by failure to object. Defendant's reasoning is flawed. The issue was not whether he was entitled to a jury trial. Under *Gallardo*, the trial court was empowered to decide the nature of his prior conviction. The issue was what evidence the trial court could properly consider, and that issue required an objection to preserve.

To the extent defendant's trial counsel was ineffective for failing to object to consideration of defendant's trial testimony as proof of his prior conviction, it is not reasonably probable that a different result would have been reached. (*Strickland v. Washington* (1984) 466 U.S. 668, 681-692.) As we have discussed above, the records of defendant's conviction in YA052593 leave no room for doubt that defendant was convicted of attempted first degree burglary. His testimony describing his prior convictions was superfluous. Even without it, the result was a foregone conclusion.[7]

IV. *Statutory Right to a Jury Trial*

We have concluded that defendant's constitutional right to a jury trial was not violated. Therefore, we need not address further his various contentions premised on his claim that his constitutional right to a jury trial was violated. However, under California law, there is a also a statutory right to a jury trial. In *People v. Epps* (2001) 25 Cal.4th 19, 23 (*Epps*), our Supreme Court held that the right to a jury trial on prior convictions was statutory (derived from sections 1025 and 1158), not based on the state or federal constitution. Further, that statutory right "extend[s] only to 'the question of whether or not the defendant

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[7] For the same reason, were we to review the purported error under the standard of *Chapman v. California* (1967) 386 U.S. 18, we would conclude beyond a reasonable doubt that consideration of defendant's testimony in the trial on the priors did not affect the determination that he was convicted of attempted first degree burglary of a residence.

has suffered the prior conviction.'" (*Gallardo, supra,* 4 Cal.5th at p. 127.)

Defendant correctly notes that on remand the trial court did not take an express waiver of his right to a jury trial on the prior convictions, and relied on a waiver given in proceedings before remand. But, given that his constitutional right to a jury trial was not implicated, the only right to a jury trial that applied was the statutory right. Assuming (without deciding) that the trial court's failure to take another waiver of the statutory right to a jury trial was erroneous, we find the issue forfeited by defendant's failure to object. Where a defendant fails to object to the discharge of a jury before his prior convictions have been tried, he forfeits on appeal the issue whether his statutory right to a jury trial was violated. (*People v. Vera* (1997) 15 Cal.4th 269, 278.) We see no reason why such a rule does not also apply here, where after remand defendant failed to object to the trial court deciding the prior conviction allegations without a jury.

Even were the issue not forfeited, the denial of the statutory right to a jury trial on prior convictions is subject to harmless error analysis under the *Watson* test (*People v. Watson* (1956) 46 Cal.2d 818, 836). (*Epps, supra,* 25 Cal.4th at pp. 28-29.) "[T]he only factual question for the jury was whether the prior convictions occurred." (*Epps, supra,* 25 Cal.4th at p. 29.) Defendant has never disputed that he suffered a prior conviction in YA052593. The documentary evidence leaves no doubt of that fact, and leaves no doubt that it was for attempted first degree burglary. Therefore, even if defendant had had the limited jury trial on

his prior conviction in YA052593 authorized by statute, it is not reasonably probable that a different result would have been reached.

Finally, to the extent defendant argues that *Epps* has been undermined by subsequent decisions, we note only that *Epps* remains, as defendant concedes, binding on this court under stare decisis. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

V. *Romero Motion/Remand*

Defendant contends that in denying his *Romero* motion to strike his prior strikes, the trial court misunderstood its discretion. He also contends that a remand is required for the trial court to exercise its discretion to determine whether to strike defendant's section 667, subdivision (a) priors. We disagree with the former contention, but agree with the latter.

A. *Proceedings*

In considering defendant's *Romero* motion, the court stated that before the guilt trial it had tried to see if a settlement could be reached. The People had offered a sentence of 25-years-to-life. However, defendant rejected the offer. The court stated that a sentence of "25 to life is appropriate" and "fair," and the court did not believe that it "could do any better [than the People's offer], especially in light of these five-year priors. And I still feel the same. . . . It's just that what I wish I could do, I can't do. The only thing I have discretion to do is to strike a strike."

The court described the crimes of which defendant was convicted in the guilt trial as "egregious . . . first degree residential burglary person present and evading. And then there are two separate similar incidents, totally unrelated. . . . So I know I have discretion to strike a strike. And . . . I'll say this, if I had discretion to strike a five-year prior, I would. But I don't. So I'm back to the *Romero* situation, the [section] 1385 situation. And given Mr. Butler's . . . criminal history and the seriousness of it . . . [i]t's difficult, if not impossible, for me to say that the interest of justice would best be served by the court finding a reason to strike the strike. Now, the only reason I could think of is that, yes, a determinant sentence, 20 some-odd years, is certainly sufficient to protect the interests represented by the People and society. It is. But to get there, to strike a strike, would be disingenuous on my part. Because I would be doing it because I think 25 to life was appropriate. And . . . I tried to get the People to get rid of the five-year priors to no avail. And so is it appropriate for me, given the discretion that I have, to strike a strike because I'm perhaps in somewhat of a disagreement as to the 35 to life[?] I just don't think I can. And that's something that I think the Court of Appeal has yet to address. But that's how I feel. I feel like if I could give him 25 to life today, I would. And if I could strike five-year priors, I would. Because I think overall 25 to life is appropriate."

The court later clarified that "after hearing the trial, I can't say that 35 to life is unjust. However, given what transpired at the trial, 25 to life would be an appropriate sentence for all of the conduct in this case, including some of the things that occurred at the trial."

The court later added that it believed that defendant had some (unspecified) factors in mitigation, and that it believed that a life sentence was appropriate, but it could not "think of any reasons under 1385 that would warrant striking a strike. Again, a five-year prior is different. I can't strike it. . . . But if I could, I would be inclined to. Because I do think overall, 25 years to life is appropriate. But 35 to life is not unreasonable. And it's not unjust. . . . I have discretion to strike a strike. But there is nothing in Mr. Butler's background and criminal history that I think would warrant it."

B. *Romero Discretion*

A trial court's discretion to strike a prior strike conviction is strictly circumscribed. "Consistent with the language of and the legislative intent behind the Three Strikes law, we have established stringent standards that sentencing courts must follow in order to find such an exception. '[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law, on its own motion, "in furtherance of justice" pursuant to Penal Code section 1385(a), or in reviewing such a ruling, the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.' [Citing *People v. Williams* (1998) 17 Cal.4th 148, 161.] [¶]

Thus, the Three Strikes law not only establishes a sentencing norm, it carefully circumscribes the trial court's power to depart from this norm and requires the court to explicitly justify its decision to do so." (*People v. Carmony* (1998) 33 Cal.4th 367, 377-378.)

The court cannot strike a strike """guided solely by a personal antipathy for the effect that the Three Strikes law would have on [a] defendant," while ignoring "defendant's background," "the nature of his present offenses," and other "individualized considerations."""" (*Williams, supra,* 17 Cal.4th at p. 159.) Indeed, a trial court can give "no weight whatsoever . . . to factors extrinsic to the [Three Strikes] scheme." (*Williams, supra*, 17 Cal.4th at p. 161.) On the other hand, the court must accord "preponderant weight . . . to factors intrinsic to the scheme, such as the nature and circumstances of the defendant's present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects." (*Ibid.*) Although in *People v. Garcia* (1999) 20 Cal.4th 490, 500, the Supreme Court stated that "defendant's sentence . . . is the overarching consideration because the underlying purpose of striking prior conviction allegations is the avoidance of unjust sentences," it also made clear that a proper basis under the factors discussed in *Williams* must exist, and the defendant must fall outside the spirit of the three strikes scheme in whole or in part, before the court can strike a strike. As the court stated, "When *a proper basis exists* for a court to strike prior conviction allegations as to at least one current conviction, the law does not require the court to treat other current convictions with perfect

symmetry if symmetrical treatment would result in an unjust sentence." (*Id.* at p. 500, italics added.)

In the present case, fairly read, the court's comments disclose a proper understanding of its discretion to strike a strike. In short, the court reasoned that a sentence of 35 years-to-life was not unjust, and although the court believed a sentence of 25-years-to-life was sufficient, the court could not find a legitimate basis to find defendant outside the scheme of the Three Strikes law. The court also expressed a willingness to strike the lesser punishment required by the two five-year, section 667, subdivision (a) priors, if the court had the discretion to do so, which at the time it did not. Thus, it imposed a sentence of 35-years to life. None of the court's reasoning discloses a failure to appreciate the scope of its discretion to strike a prior strike conviction.

C. *Remand*

Effective January 1, 2019 (after appellant's sentencing), SB 1393 deleted former subdivision (b) of section 1385, which precluded the trial court from striking the five-year enhancements for defendant's prior serious felony convictions under section 667, subdivision (a). With the deletion of subdivision (b) of section 1385, the trial court now has such discretion. Defendant's case is not final on appeal, and therefore he is entitled to the ameliorative effect of the enactment.[8] Further, a remand

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[8] "A judgment becomes final when the availability of an appeal and the time for filing a petition for certiorari with the United States Supreme Court have expired." (*People v. Buycks* (2018) 5 Cal.5th 857, 876, fn. 5.) The time to file a petition for certiorari expires 90 days after our opinion is filed—

is appropriate. In the analogous situation involving the enactment of Senate Bill No. 620, which gave the trial court discretion to strike firearm enhancements under section 12022.5 and 12022.53, courts have held that a remand to allow the trial court to exercise that discretion "is required unless the record reveals a clear indication that the trial court would not have reduced the sentence even if at the time of sentencing it had the discretion to do so. [Citation.] Without such a clear indication of a trial court's intent, remand is required when the trial court is unaware of its sentencing choices." (*People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110; see *People v. McDaniels* (2018) 22 Cal.App.5th 420, 426-428; *People v. Chavez* (2018) 22 Cal.App.5th 663, 713.) Here, the record clearly reflects that the court was inclined to strike defendant's prior section 667, subdivision (a) priors. Therefore, the appropriate course is to remand the case for the court to decide whether to exercise its newly enacted discretion. We express no opinion on how the court should rule. We note only: (1) the court's decision must be "in strict compliance with section 1385(a)" (*Romero, supra,* 13 Cal.4th at p. 530), and (2) under the full resentencing rule, should the court decide to strike one or both of the section 667, subdivision (a) priors, it is entitled to reconsider its other prior sentencing choices (see *People v. Buycks, supra,* 5 Cal.5th at p. 893).

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longer, if the defendant files a petition for review. (U.S. Supreme Ct. Rules, rule 13(1), (3).) That takes finality well into 2019.

D. *Credit*

The sentence imposed in this case occurred on May 24, 2017. It was a resentencing upon remand from this court following defendant's first appeal. The obligations of the trial court to calculate and award credits in such a case on resentencing is set forth in *People v. Buckhalter* (2001) 26 Cal.4th 20 (*Buckhalter*). There, the California Supreme Court held "When, as here, an appellate remand results in modification of a felony sentence during the term of imprisonment, the trial court must calculate the *actual time* the defendant has already served and credit that time against the 'subsequent sentence.' (§ 2900.1.) On the other hand, a convicted felon once sentenced, committed, and delivered to prison is not restored to presentence status, for purposes of the sentence-credit statutes, by virtue of a limited appellate remand for correction of sentencing errors. Instead, he remains 'imprisoned' (§ 2901) in the custody of the Director 'until duly released according to law' (*ibid.*), even while temporarily confined away from prison to permit his appearance in the remand proceedings. Thus, he cannot earn good behavior credits under the formula specifically applicable to persons detained in a local facility, or under equivalent circumstances elsewhere, 'prior to the imposition of sentence' for a felony. (§ 4019, subds. (a)(4), (b), (c), (e), (f). . . .) Instead, any credits beyond *actual custody time* may be earned, if at all, only under the so-called worktime system separately applicable to convicted felons serving their sentences in prison. (§§ 2930 et seq., 2933.)" (*Id.* at p. 23.)

In the case of a resentencing on remand, the effect of *Buckhalter* is that the trial court on resentencing must prepare a new abstract of judgment in which: (1) it recalculates (and credits the defendant with) all actual days *spent in jail or prison* before the resentencing, and (2) awards local custody credit for the *original period of county jail custody before the original sentencing*. As for any other conduct credits to which a defendant may be entitled, the court must defer to the CDCR to calculate prison credits for the remaining period of actual custody after the original sentencing, because defendant is deemed to be in prison custody for that period. (*Buckhalter, supra*, 26 Cal.4th at pp. 23, 30-31, 37; see also *People v. Robinson* (1994) 25 Cal.App.4th 1256, 1258 ["[C]alculation of credit for good behavior and for work time is the province of the prison administration"].)

In the present case, at the time of resentencing, the court orally calculated defendant's actual time in custody, from the date of his arrest on July 31, 2013, through to his resentencing on November 1, 2017, as 1,555 days. The parties agree, as do we, that this calculation was correct. However, the abstract of judgment incorrectly awarded defendant only 1,034 days of actual custody.

Also, the trial court declined to make any credit calculations, stating it was "more comfortable with" the CDCR calculating the credits. Under *Buckhalter,* however, the court was required to calculate and award credit for the period of actual custody from the date of defendant's arrest on July 31, 2013, to his original sentencing on February 24, 2015, a period of 574 days. Calculated at 15 percent,

defendant was entitled to 86 days of conduct credit for that period. The parties agree with this calculation, as do we. (We note that despite the trial court's failure to calculate any credits, the abstract of judgment reflects an award of 66 days conduct credits—a calculation that was erroneous.)

To avoid any further confusion, we direct as follows. On resentencing following remand from this appeal, the trial court must recalculate (and credit the defendant with) all actual days spent in jail or prison through the date of that resentencing. To aid in that calculation, we note that as of May 24, 2017, the date of the first resentencing, defendant was entitled to 1,555 days of actual presentence custody. The court must also award local conduct credit of 86 days (calculated at 15%) for the period of defendant's county jail custody from the date of arrest (July 31, 2013) to his original sentencing (February 24, 2015). The court shall prepare an abstract of judgment reflecting these calculations, in addition to any other change in sentence made upon remand.

*Double Jeopardy*

Defendant contends that his trial on his prior convictions violated the constitutional protection against double jeopardy. However, he failed to object on that ground in the trial court, and therefore the issue is forfeited. (*People v. Holloway* (2004) 33 Cal.4th 96, 155, fn. 18.) Defendant also contends that his trial counsel was ineffective for not objecting. We disagree. As we held in *Marin, supra,* 240 Cal.App.4th at page 1366, we are bound by the decisions in *People v. Monge* (1997) 16

Cal.4th 826, *Monge v. California* (1998) 524 U.S. 721, and *People v. Barragan* (2004) 32 Cal.4th 236, 239, 241–242, under which a retrial on prior conviction allegations does not violate double jeopardy. Thus, there is no reasonable probability that a different result would have been reached had counsel objected in the trial court. (*Strickland, supra,* 466 U.S. 668 at pp. 681-692.)

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## DISPOSITION

The sentence is vacated, and the case is remanded for the trial court to exercise its discretion whether to strike defendant's 667, subdivision (a) prior convictions. Should it decide to do so, it may reconsider its other prior sentencing choices. In addition, the court shall calculate the actual time the defendant has already served in custody and credit that time against the sentence, and award conduct credits of 86 days attributable to the period of actual custody from the date of arrest through the original sentencing. The court shall prepare an amended abstract of judgment so reflecting. In all other respects, the judgment is affirmed.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

WILLHITE, Acting P. J.

We concur:

COLLINS, J.

MICON, J.*

*Judge of the Los Angeles County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.